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No. 56265-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION, a Washington Non-Profit Corporation,

Respondent

vs.

SATOMI, LLC, a Washington Limited Liability Company,

Appellant.

OPENING BRIEF OF APPELLANT SATOMI, LLC

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ASSIGNMENTS OF ERROR

The Superior Court erred by (1) quashing Appellant/Defendant Satomi, LLC's demand that Respondent/Plaintiff Satomi Owners Association submit to arbitration its claims against Satomi, LLC, and (2) denying Satomi, LLC's motion to compel arbitration.

Issues Pertaining to Assignment of Error.

1. Whether the Superior Court erred by concluding that this case does not involve interstate commerce under the Commerce Clause of the United States Constitution, and so the Federal Arbitration Act does not apply, despite the fact that the Satomi Owners Association has sued for construction defects in the Satomi Condominiums and over 70% of the materials used in constructing those condominiums came from out-of-state.[1]

2. Whether the Superior Court erred by concluding that Satomi, LLC did not prove that all purchasers of the Satomi Condominiums agreed to arbitrate, despite the fact that Satomi, LLC presented substantial, uncontroverted evidence that the purchasers agreed to arbitrate.[2]

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[1] This Court reviews questions of arbitrability *de novo*. *See, e.g., Kamaya Co. Ltd. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 713, 959 P.2d 1140 (1998), review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999); *ACF Prop. Mgmt., Inc. v. Chaussee*, 69 Wn. App. 913, 919, 850 P.2d 1387 (1993); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995).

[2] *See* note 1 above.

3. Whether the Superior Court erred by concluding that the Satomi Owners Association is not bound by the agreement to arbitrate entered into by the Association's members (the individual purchasers of the Satomi Condominium units), despite the fact that the Association's claims are (1) brought on behalf of the Association's members and (2) brought under the contract containing the agreement to arbitrate.[3]

STATEMENT OF THE CASE

Appellant Satomi, LLC ("Satomi") developed the Satomi Condominiums, a condominium complex comprised of 85 units in 18 buildings, located in Bellevue, Washington. Clerks Papers ("CP") 18. When each of those condominium units was sold, each purchaser signed a warranty addendum (the "Warranty Addendum") that states the various warranties Satomi was providing to the purchasers. CP 163-76, 1383-84.[4] In the Warranty Addendum, the purchasers agreed to arbitrate any claims they may later bring, *or that their homeowners association may later bring*, against Satomi for (1) breach of the warranties in the Warranty Addendum or (2) breach of *any other warranty* relating to the Satomi

[3] *See* note 1 above.

[4] Signed Warranty Addendums are attached to the Second Declaration of Judy Nordstrom in Support of Motion to Compel Arbitration. Apparently, an incomplete version of Ms. Nordstrom's second declaration was initially submitted to the trial court. CP 163-64. Satomi then attached a complete copy of Ms. Nordstrom's second declaration to its reply on its motion to reconsider the order quashing Satomi's arbitration demand. CP 1383-84.

Condominiums. *See, e.g.*, CP 170. Despite that agreement, the purchasers' homeowners association, Respondent Satomi Owners Association (the "Association"), has sued Satomi for breaches of warranties relating to the Satomi Condominiums, but has refused to arbitrate those claims as required by the Warranty Addendum.

The Warranty Addendum that was attached to the original purchase and sale agreements for each of the 85 Satomi Condominium units, and that each purchaser of those units agreed to (CP 163-76, 1383-84), contains an arbitration agreement (the "Arbitration Agreement") providing:

> The Seller [Satomi] and Purchaser agree that the Seller's and the Declarant's warranties to the Purchaser and the Purchaser's successors and transferees, ***for the Unit and all Common Elements in the Condominium identified above***, are limited to the terms stated in this Warranty Addendum ("Warranty").
>
> Seller's Right to Arbitration. At the option of the Seller, Seller may require that any claim asserted by Purchaser ***or by the Association*** under this Warranty ***or any other claimed warranty*** relating to the Unit or Common Elements ***must be decided by arbitration*** in King County, Washington under the Construction Arbitration Rules of the American Arbitration Association (AAA) in effect on the date hereof . . . . ***Any issue about whether a dispute or claim must be arbitrated pursuant to this Warranty shall be determined by the arbitrator. . . . There shall be no substantive motions or discovery, except the arbitrator shall authorize such discovery as may be necessary to ensure a fair hearing***, which shall be held within 120 days of the demand and concluded within two days. . . . The

> decision rendered by the arbitrator shall be final and binding without appeal . . . .

See, e.g., CP 167, 170 (emphasis added). Each of the 85 purchasers of the Satomi Condominiums signed the Warranty Addendum. CP 163-1176, 1383-84.

After the Association's members (*i.e.*, the homeowners) bought their Satomi Condominium units, the Association raised issues with Satomi regarding the Satomi Condominiums, but the parties were unable to informally resolve those issues. CP 133. The Association then filed this lawsuit against Satomi, alleging defects in construction and construction materials and resulting damages throughout the Satomi Condominium complex, including the condominium units, limited common elements, and common elements. CP 3-9. Based on those allegations, the Association is suing on behalf of the condominium unit purchasers for breach of express and implied warranties under the Washington Condominium Act, Chapter 64.34 RCW (the "WCA") and the "Implied Warranty of Habitability" and for violations of the Washington Consumer Protection Act, Chapter 19.86 RCW (the "CPA"), stemming from those breaches.[5] CP 6-9.

[5] As explained below, while the Association's Complaint alleges breach of express warranties, the Association has admitted it has no valid claim for breach of express warranties. The Association also sues on its own behalf for violation of the duty to provide the Association with the plans and specifications utilized in the construction of

In response, Satomi demanded that the Association's claims be submitted to arbitration under the terms of the Arbitration Agreement in the Warranty Addendum. Specifically, Satomi demanded arbitration in its answer to the Association's Complaint, citing the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) (the "FAA"), the Washington Arbitration Act (Chapter 7.04 RCW), and the Arbitration Agreement in the Warranty Addendum. CP 10-15. Satomi sent the Association notice under RCW 7.04.060 of its demand for arbitration. CP 47- 48.

Despite Satomi's arbitration demand under the clear language of the Arbitration Agreement, the Association refused to arbitrate its claims and filed a motion to quash Satomi's arbitration demand. CP 37, 18-106. Satomi opposed the Association's motion and cross-moved to compel arbitration. CP 109-137.

The Superior Court granted the Association's motion to quash Satomi's arbitration demand, thereby denying Satomi's cross-motion to compel arbitration. CP 143-44. The Superior Court based its order on three erroneous conclusions: (1) that this case does not involve interstate commerce and so the FAA does not apply here;[6] (2) that Satomi did not

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the Satomi Condominiums, under RCW 64.34.312(j) and Section 14.3.10 of the Condominium Declaration for the Satomi Condominiums. CP 6-7.

[6] Whether the FAA applies here is important because, as discussed below, if it applies, it preempts the WCA and requires enforcement of the Arbitration Agreement, despite the WCA's provision that rights under the WCA are to be enforced by judicial proceeding,

prove that all of the owners of the Satomi Condominium units agreed to the Arbitration Agreement; and (3) that even if all of the owners did agree to the Arbitration Agreement, the Association is a legally separate entity and, thus, the Arbitration Agreement does not apply to the Association. CP 144.

Satomi moved the Superior Court to reconsider its order, challenging all three of the erroneous conclusions on which the Court based its order. CP 147-62. The Superior Court denied Satomi's motion to reconsider, without providing any indication of its basis for denying the motion; the Court simply stated that the motion was "DENIED." CP 1394-95. Thus, the Court did not indicate which of its three original conclusions survived Satomi's motion to reconsider.

Satomi timely filed notices of appeal seeking review of the Superior Court's order quashing Satomi's arbitration demand and denying reconsideration. CP 1389-93, 1396-99.

ARGUMENT

This Court reviews questions of arbitrability *de novo*. *See, e.g., Kamaya Co. Ltd. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 713, 959 P.2d 1140 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099

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not arbitration. *Marina Cove Condo. Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 235-36, 34 P.3d 870 (2001).

(1999); *ACF Prop. Mgmt., Inc. v. Chaussee*, 69 Wn. App. 913, 919, 850 P.2d 1387 (1993); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). In Washington, agreements to arbitrate are enforceable and, as a matter of public policy, arbitration of disputes is strongly favored by the courts. *Harvey v. Univ. of Washington*, 118 Wn. App. 315, 318, 76 P.3d 276 (2003); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45-46, 17 P.3d 1266 (2001); *Kamaya*, 91 Wn. App. at 713-14; *W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco*, 47 Wn. App. 681, 683, 736 P.2d 1100 (1987) (citing *AT & T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)).

Once a party seeking arbitration presents some evidence of the existence of a contract requiring arbitration of the claims at issue, the burden shifts to the party opposing arbitration to present evidence that the arbitration agreement is invalid or does not apply to the dispute in question. *See Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So.2d 454, 457 (Ala. 1999). A party opposing arbitration bears the burden of showing its claims are not arbitrable. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 453, 45 P.3d 594 (2002). "'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract

language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Kamaya*, 91 Wn. App. at 714 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)).

Here, as discussed below, Satomi presented evidence that the Association is required to arbitrate, and the Association failed to show that its claims are not subject to arbitration under the Arbitration Agreement. Thus, the Superior Court erred in granting the Association's motion to quash Satomi's arbitration demand and, thereby, denying Satomi's motion to compel arbitration.

A. The FAA Applies To This Case, Making The Agreement To Arbitrate In The Warranty Addendum Enforceable As To The Association's Claims.

In support of its motion to quash Satomi's arbitration demand, the Association argued to the Superior Court that the Arbitration Agreement is unenforceable as to the Association's WCA claims. Citing *Marina Cove Condo. Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 870 (2001), the Association argued that "claims arising out of the [WCA] are not subject to binding arbitration because the language of the [WCA] specifically provides for 'judicial' enforcement" of the WCA's

provisions.[7] CP 22. In response, Satomi argued that the WCA's provision for judicial enforcement does not apply because the FAA preempts the "anti-arbitration" clause of the WCA and, thus, requires enforcement of the Arbitration Agreement, even as to the Association's WCA claims. CP 113-15, 157-60, 1379-81. In granting the Association's motion to quash, the Superior Court based its order on the erroneous conclusion that this case does not involve interstate commerce, and so the FAA does not apply.[8] CP 144.

As indicated above, the Superior Court did not provide any indication of its basis for denying Satomi's motion to reconsider and, thus, did not indicate whether its conclusion that the FAA does not apply survived Satomi's motion to reconsider. CP 1394-95. To the extent it did survive, the Superior Court erred in making and sustaining that conclusion.

It is important to understand that the Association's anti-arbitration argument based on RCW 64.34.100(2)'s "judicial proceeding" clause, applies only to the Association's WCA claim, not its other claims, such as for violations of the "Implied Warranty of Habitability" and the CPA.

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[7] The WCA provides: "Any right or obligation declared by this chapter is enforceable by judicial proceeding." RCW 64.34.100(2).

[8] Specifically, the Superior Court concluded that "the thrust of the Court of Appeals' analysis in *Marina Cove* was that condo sales are a matter which primarily impacts Washington residents." CP 144.

Thus, even if the FAA does not apply, the Superior Court should have stayed the entire lawsuit while the non-WCA claims were arbitrated. *See* RCW 7.04.030 (if "any issue" is arbitrable, entire lawsuit must be stayed until completion of the arbitration).

1. The Superior Court Erred In Ruling That The FAA Does Not Apply.

(a) The sales of the Satomi Condominiums to the homeowners were transactions "affecting commerce."

The FAA's requirement that agreements to arbitrate must be enforced extends to the full reach of the broad scope of Congress's power under the Commerce Clause of the United States Constitution, covering all transactions "affecting commerce." Courts have repeatedly held that broad scope to include local businesses using even a small amount of products or materials that have traveled in interstate commerce. Here, Satomi presented the Superior Court with uncontroverted evidence that more than 70% of all of the construction materials that went into the Satomi building were manufactured in other states or countries and shipped in interstate commerce, demonstrating that the FAA clearly applies.

The FAA applies if there is "commerce among the several States." 9 U.S.C. §§1, 2. Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction ***involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.***

9 U.S.C. §2. The Supreme Court has interpreted the term "involving commerce" under the FAA "as the functional equivalent of the more familiar term 'affecting commerce' — that is, 'within the flow of interstate commerce,'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995), and this Court has adopted that interpretation. *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 123 Wn. App. 355, 361, 98 P.3d 66 (2004) (citing *Allied-Bruce*, 513 U.S. at 277) ("The United States Supreme Court has construed 'involving commerce' as expansively as possible, as broadly as the words 'affecting commerce.'"). Thus, in *Kruger*, this Court held that the "scope of the FAA's provisions concerning the validity of arbitration clauses reaches to the farthest limits of Congress' power under the Commerce Clause." *Kruger*, 123 Wn. App. at 361.

The Commerce Clause has, for 70 years, been interpreted extremely broadly. The scope of the Commerce Clause has twice been hotly litigated — first at the time of the "court-packing" crisis in the

1930's and later in the 1960's when civil rights legislation was challenged by segregationists. During both of those periods of intensive analysis of the Commerce Clause, the U.S. Supreme Court decided that "interstate commerce" encompasses any commerce in which even only a small part is interstate.

Like the states' rights advocates in the 1960's civil rights cases, the Association here argues that its homeowners were merely local folks buying locally. According to the U.S. Supreme Court, that argument misses the mark. Most consumer purchases, except perhaps for mail-order or Internet purchases, are made locally. But, for over 70 years, the U.S. Supreme Court has instructed us that "local" purchases are generally "transactions involving commerce" (FAA, 9 U.S.C. §2) because goods sold "locally" move in the stream of interstate commerce.

The seminal 1960's U.S. Supreme Court decisions establishing the far reach of the Commerce Clause are *Daniel v. Paul*, 395 U.S. 298, 89 S. Ct. 1657, 23 L. Ed. 2d 318 (1969), *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964), and *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964). In *Daniel*, the Court found interstate commerce in a snack bar at the Lake Nixon Club because, in part, there could be "no serious doubt" that a "substantial portion of the food" had "moved in interstate commerce," since "three of

the four food items sold at the snack bar contain ***ingredients*** originating outside of the State." 395 U.S. at 305 (emphasis added). Similarly, in *Katzenbach*, the Court found interstate commerce in Ollie's Barbeque because, in part, Ollie's bought, from a local supplier, 46% of its meat — and that meat had previously moved in interstate commerce. 379 U.S. at 296-97. Finally, in *Heart of Atlanta Motel*, the Court found interstate commerce in a motel:

> It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, if it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.

Heart of Atlanta Motel, 379 U.S. at 258 (citation omitted).

Given the broad scope of the Commerce Clause, one court commented:

> [I]t would be difficult indeed to give an example of an economic or commercial activity that one could, *with any confidence*, declare beyond the reach of Congress's power under the Commerce Clause and, by extension, under the FAA. . . . [A] trial court evaluating a contract connected to some economic or commercial activity would rarely, if ever, refuse to compel arbitration on the ground that the transactions lacked "involvement" in interstate commerce.

Serv. Corp. Int'l v. Fulmer, 883 So.2d 621, 629 (Ala. 2003) (emphasis in original) (finding that dispute between individual and local funeral parlor for mis-delivery of remains was subject to FAA because funeral services in general affect interstate commerce and the funeral home was subject to

federal regulation); s*ee also 1745 Wazzee LLC v. Castle Builders, Inc.*, 89 P.3d 422, 425 (Col. Ct. App. 2003) (court concluded that dispute arising from a general contractor's negligent installation of a boiler was subject to FAA, noting that the analysis of interstate commerce "is not a rigorous inquiry" and that only the "slightest nexus with interstate commerce" is required).

Carrying on the tradition of *Daniel*, *Katzenbach*, and *Heart of Atlanta Motel*, courts have repeatedly held that where Congress has used the full extent of its Commerce Clause power by enacting legislation reaching activity "affecting commerce," such legislation applies to local businesses using even a small amount of products or materials that have traveled in interstate commerce. For example, in *Allied-Bruce Terminix Cos. v. Dobson*, the owner of a single family residence entered into a contract with an exterminator to rid the house of termites and perform repair work. 513 U.S. at 270. The house was sold after the work was performed, and, upon discovering a persistent infestation after the sale of the home, the original owner and the subsequent purchaser brought suit against the exterminator in state court. The exterminator moved for a stay to allow arbitration to proceed pursuant the terms of the contract between the parties, as mandated by the FAA. *Allied-Bruce*, 513 U.S. at 268-69. The trial court denied the stay, and the exterminator appealed. The

Supreme Court held that the FAA was triggered by the fact that the exterminator's termite-treating and house-repairing materials came from outside the state. *Allied-Bruce*, 513 U.S. at 282 ("In addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama."). Accordingly, under *Allied-Bruce*, the FAA is triggered where the raw materials employed by a contractor travel in interstate commerce.

Similarly, in *Citizens Bank v. Alafabco, Inc.*, the Supreme Court held that a loan made in Alabama by Alabama residents was within the jurisdiction of the Commerce Clause, rendering the FAA applicable, because:

> [the loan] was secured by all of Alafabco's business assets, including its inventory of goods assembled from out-of-state parts and raw materials. If the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce, *Katzenbach v. McClung*, 379 U.S. 294, 304-305, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964), it necessarily reaches substantial commercial loan transactions secured by such goods.

539 U.S. 52, 57, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003).

The Ninth Circuit has followed the precedents. In *EEOC v. Ratliff*, the Ninth Circuit reaffirmed *Daniel*, *Katzenbach,* and *Heart of Atlanta Motel*, holding:

> The "affects commerce" jurisdiction obstacle is very low indeed. . . . If [a business] uses items that have moved through interstate commerce at some point in their lives . . . the "affects commerce" requirement is satisfied.

906 F.2d 1314, 1316 (9th Cir. 1990). In response to defendant Ratliff's argument that the EEOC's expansive view of the Commerce Clause "taken to its logical conclusion would entirely eliminate the 'affecting interstate commerce' jurisdictional prerequisite," the *Ratliff* Court acknowledged as much:

> While we do not foresee that the [EEOC's] reasoning would 'entirely eliminate' the jurisdictional barrier, we do agree that it would give it little force. That, however, would seem to characterize fairly the state of the law.

906 F.2d at 1318.

Similarly, in *Usery v. Lacy*, the Ninth Circuit (citing *Daniel*) found interstate commerce in a business constructing a medium-sized apartment building because the business "used material and tools manufactured by Weyerhaeuser and Craftsman (Sears Roebuck)." 628 F.2d 1226, 1229 n.3, (9th Cir. 1980). The *Usery* Court reasoned as follows:

> The use of material that has at any point moved in commerce is enough to establish that a business ***affects commerce***, and it is appropriate to take judicial notice of the fact that [the employer's] ultimate suppliers, Weyerhaeuser and Sears, are engaged in the production and distribution of goods for commerce.

628 F.2d at 1229 (emphasis added).

In *NLRB v. Maxwell*, the Ninth Circuit found interstate commerce in a producer and seller of ready-mixed concrete because the business purchased $7,920 worth of goods from other states. 637 F.2d 698, 704 (9th Cir. 1981). *See also NLRB v. Inglewood Park Cemetery Ass'n*, 355 F.2d 448, 451 (9th Cir.), *cert. denied, First Congregational Church of Los Angeles v. NLRB*, 384 U.S. 951, 86 S. Ct. 1572, 16 L. Ed. 2d 548 (1966) (holding that $3,000 of interstate purchases supported Commerce Clause jurisdiction).

Finally, citing *Daniel* and *Maxwell*, The United States District Court for the Western District of Washington found interstate commerce in a business that

> made purchases [from out of state] of $25,000 in each of the three years immediately preceding this suit, 1980, 1981, and 1982[, and] also purchased approximately $200,000 of goods each year from firms which had in turn purchased those goods from out of state.

Retail Drug Employees Welfare Trust Fund v. Hemmat, 1983 WL 2042, *2 (W.D. Wash. March 3, 1983) (unpublished opinion). Thus, because the "scope of the FAA's provisions concerning the validity of arbitration clauses reaches to the farthest limits of Congress' power under the Commerce Clause" (*Kruger*, 123 Wn. App. at 361), those provisions apply to any transaction involving a local business's use of even a small amount of products or materials that have traveled in interstate commerce.

Here, Satomi presented the Superior Court with uncontroverted evidence that more than 70% of all materials used in the construction of the Satomi Condominiums were manufactured outside of the state and shipped through interstate commerce. CP 135-37. The Association presented no evidence to the contrary.[9] Indeed, the Association alleges the component materials incorporated into the project are defective, specifically alleging that the components that Satomi used in the Satomi Condominiums are part of the "construction defects" at issue in this case:

> 6. The Condominium has a variety of construction defects and other deficiencies in building ***components*** and/or installation ***including, but not limited to, siding and trim, sealant joints, building paper, flashing, penetration wraps, concrete entry patios and walkways, parapet guardrails on walkways, columns, shear walls, windows, and concrete slab on grade.*** In addition, there are other elements of the project that are currently being investigated that may lead to the discovery of additional construction defects and deficiencies.

CP 4 (emphasis added). The Complaint similarly makes additional claims against Satomi based on the allegedly defective materials used by Satomi in this project. In paragraphs 14 and 15 of the Complaint, the Association makes clear its intention to assert that the use of defective materials constitutes a significant portion of its claims against Satomi:

[9] The Association's counsel is well aware from its many other WCA cases that the siding referenced in the Association's "List of Known Defects," James Hardie Siding, is produced from a California corporation and the wood trim is generally produced in Canada. CP 101.

> 14. Defendant made implied warranties under the Washington Condominium Act ("WCA"), RCW 64.34.445, that the Condominium ***is free from defective materials***, constructed in accordance with sound engineering and construction standards and in compliance with all applicable laws.
>
> 15. Defendant breached the implied warranties of the WCA because the condominium ***is not free from defective materials*** and/or was not constructed in accordance with sound engineering and construction standards and/or in compliance with all applicable laws.

CP 6; *see also* paragraphs 18 and 19 of the Complaint, at CP 6. The Association's "List of Known Defects" further confirms that the Association intends to assert defective material claims, such as that the "Grade of wood trim is inferior and will deteriorate prematurely." CP 101.[10] Accordingly, the construction and sale of the Satomi Condominiums, as well as the Association's claims regarding that construction and sale, "involve" interstate commerce and trigger the FAA.

To paraphrase the Lake Nixon Club case (*Daniel*), there can be "no serious doubt" that a "substantial portion of the [completed condominium units]" had "moved in interstate commerce," since "[70%] of the [materials incorporated into the condominium units] sold [by Satomi] contain [allegedly defective] ingredients originating outside the State." *Daniel*, 395 U.S. at 305. This Court would be rolling back 70 years of

[10] The Association has made clear in both its "List of Known Defects" and Complaint that its list of potentially defective products as specified in either document can only grow with time and more investigation. CP 4, 100–01.

hallowed Supreme Court precedent — on which the civil rights laws are founded — as well as firmly established Ninth Circuit precedent, if this Court were to find that this lawsuit does not implicate interstate commerce.

(b) *Marina Cove* is distinguishable from this case.

The Association cited *Marina Cove* in support of its motion to quash Satomi's arbitration demand, and the Superior Court referenced that case in concluding that the FAA does not apply here.[11] CP 22, 144. This case is not *Marina Cove*.

One issue in *Marina Cove* was whether the case triggered the FAA's provisions requiring the enforcement of agreements to arbitrate. 109 Wn. App. at 242-43. If so, any provisions of the WCA that might be interpreted as rendering arbitration agreements unenforceable would be

[11] Specifically, the Superior Court concluded that, while Satomi made a more particularized showing that the construction of the Satomi Condominium involves interstate commerce, the thrust of the decision in *Marina Cove* "is that condo sales are a matter which primarily impacts Washington residents." CP 144. It appears from this language that the Superior Court concluded there were insufficient ties to interstate commerce for the FAA to apply. But, to the extent that the Superior Court may have concluded that, under *Marina Cove*, all condominium sales in Washington are exempt from federal laws, the Superior Court clearly erred. The applicability of the FAA is to be decided on a case-by-case basis. *See, e.g., Serv. Corp. Int'l v. Fulmer*, 883 So.2d at 628 (noting that the FAA contains a jurisdictional element which would ensure, through case-by-case inquiry, that most transactions affect interstate commerce). Further, as discussed below, the *Marina Cove* Court did not decide that the FAA did not apply based on a finding that condominium sales, generally, are a matter that primarily impacts Washington residents. Rather, the Court clearly held that the FAA did not apply to the Marina Cove Condominiums because there was no *showing* that the Marina Cove Condominiums involved interstate commerce. *Marina Cove*, 109 Wn. App. at 244.

preempted by the FAA. *Marina Cove*, 109 Wn. App. at 242. The *Marina Cove* Court ultimately concluded that the ties to interstate commerce were insufficient for the FAA to apply. 109 Wn. App. at 244.

Unlike in this case, the *Marina Cove* claimants did **not** argue that interstate commerce was established because of defective materials shipped from outside Washington. *See* CP 1284-375 (the appellate briefs of defendants in *Marina Cove*, in which defendants rely solely on two isolated sales as a basis for their interstate commerce argument). In fact, the *Marina Cove* plaintiffs did not even allege defects in materials. Rather, *Marina Cove* concerned only the construction workmanship warranty under the WCA:

> After all the units were sold, ***the homeowners discovered alleged defects in the construction of the buildings***. When they were unable to resolve their warranty disputes, the homeowners association sued for breach of implied warranties under the Washington condominium act.

Marina Cove, 109 Wn. App. at 234 (emphasis added).

To establish a connection with interstate commerce, the developer in *Marina Cove* asserted that the FAA was triggered merely because the sale of *one* condominium unit involved a buyer who moved to Washington from another state and the sale of another unit involved the buyer transferring funds from an out-of-state bank. 109 Wn. App. at 244. On

these facts, and with only allegations of a breach of the workmanship warranty, the *Marina Cove* Court held that the FAA did not apply:

> The only connection to other states involves one buyer, who moved to Washington from another state, and another buyer, who transferred funds from an out-of-state bank account for use as a down payment on one unit purchased. That negligible contact with other states does not constitute a substantial effect on interstate commerce. The FAA does not apply.

Marina Cove, 109 Wn. App. at 244.[12]

In this case, however, the ties between the Association's claims and interstate commerce are far more substantial. Here, as discussed above, the Association has alleged that "defective" materials were used in constructing the Satomi Condominiums. CP 4, 6, 101. More than 70% of the construction materials that went into the Satomi Condominiums were manufactured in other states or countries and shipped in interstate commerce. CP 135-37.

Unlike *Marina Cove*, this case involves interstate commerce to a much greater extent than the seminal civil rights cases of the 1960's, in which the U.S. Supreme Court found interstate commerce, as well as Ninth Circuit case law following those precedents.

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[12] Satomi believes *Marina Cove* is inconsistent with U.S. Supreme Court decisions, Ninth Circuit decisions, other federal court decisions, and other states' highest courts' decisions. However, given the extremely different facts presented here, this Court can rule that the FAA applies without overruling *Marina Cove*.

The *Marina Cove* Court noted that *United State v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), "clarified the extent" of Congress's Commerce Clause power. *Marina Cove*, 109 Wn. App. at 243. However, the *Lopez* Court recognized the continued validity of the rule, established by *Katzenbach* and *Heart of Atlanta Motel* and discussed above, that Congress's Commerce Clause power extends to local businesses using out-of-state goods:

> [W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include . . . restaurants utilizing substantial interstate supplies, [*Katzenbach v.*] *McClung*, *supra*, [and] inns and hotels catering to interstate guests, *Heart of Atlanta Motel*, *supra* . . . . These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Lopez, 514 U.S. at 559 (1995). Justice Kennedy reiterated the continued validity of *Heart of Atlanta Motel* and *Katzenbach* in his concurring opinion, in which he wrote: "[*Heart of Atlanta Motel*, *Katzenbach*] and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today." *Lopez*, 514 U.S. at 572. Further, post-*Lopez*, the United States Supreme Court has noted the continued validity of *Heart of Atlanta Motel* and *Katzenbach*. *See, e.g., Gonzales v. Raich*, 125 S. Ct. 2195,

2216, 162 L. Ed. 2d 1 (2005) (Scalia, J., concurring). Finally, in *Citizens Bank*, the United States Supreme Court, post-*Lopez*, found interstate commerce in a loan transaction because the loan was secured by goods and raw materials that had traveled in interstate commerce, as discussed above. *Citizens Bank*, 539 U.S. at 57.

* * * * *

If the local sale of a hot dog (*Daniel* and *Katzenbach*), the local sale of funeral services (*Fulmer*), the local sale of a boiler (*Wazzee*), the local operation of a motel (*Heart of Atlanta Motel*), the local performance of termite extermination and house-repair work (*Allied-Bruce*), the local construction of an apartment building (*Usery*), the local sale of concrete (*Maxwell*), and a local loan (*Citizens Bank*) all constitute "transactions involving commerce," there can be no question that the sales of condominium units built 70% from out-of-state materials also involve commerce. This case is subject to the FAA, and, thus, the Agreement to Arbitrate in the Warranty Addendum is fully enforceable as to all of the Association's claims, including its claims under the WCA.

(c) The FAA preempts the WCA.

Arbitration agreements are strongly favored under federal law: "The basic purpose of the Federal Arbitration Act is to overcome courts'

refusals to enforce agreements to arbitrate."[13] *Allied-Bruce*, 513 U.S. at 270. Thus, the FAA "places arbitration agreements on the same footing as other types of contracts" (*Marina Cove*, 109 Wn. App. at 242) and preempts any provisions of the WCA that would otherwise render unenforceable the Warranty Addendum's agreement to arbitrate. *See, e.g., Adler v. Fred Lind Manor*, 153 Wn.2d 331, 343-44, 103 P.3d 773 (2004) (holding that FAA preempts provision of the Washington Law Against Discrimination requiring a judicial forum for discrimination claims); *Allison v. Medicab Int'l, Inc.*, 92 Wn.2d 199, 202-04, 597 P.2d 380 (1979) ("The majority rule, however, appears to be that the [FAA] does apply and requires a state court to enforce an arbitration clause despite a contrary

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[13] Washington also has a strong public policy favoring arbitration of disputes. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (affirming trial court's order compelling arbitration of employment dispute upon motion of respondent employer). As a window into the future of disputes between a condominium declarant and condominium owners under the WCA, new Section 11 to the WCA, effective August 1, 2005, reads as follows:

> **If the declarant, an association, or a party unit owner demands an arbitration** by filing such demand with the court not less than thirty and not more than ninety days after filing or service of the complaint, whichever is later, **the parties shall participate in a private arbitration hearing**. The declarant, the association, and the party unit owner do not have the right to compel arbitration without giving timely notice in compliance with this subsection. Unless otherwise agreed by the parties, the arbitration hearing shall commence no more than fourteen months from the later of the filing or service of the complaint.

Engrossed House Bill 1848, Ch. 456, 2005 (Bill Text WA H.B. 1848), New Sec. 11 (emphasis added), at CP 1256–58. This new section does not apply to the current lawsuit. However, the new section is nonetheless informative that a decision here that grants Satomi's right to arbitrate the Association's claims under the WCA is fully consistent with Washington's strong public policy in favor of arbitration, as recently expressed by the Legislature through the new section above.

state law or policy[, and] thus the [FAA] requires enforcement of the arbitration clause in the franchise agreement despite the judicial remedies afforded by the [Washington] Franchise Investment Protection Act."); *Kruger,* 123 Wn. App. at 361 (holding that FAA preempts application of RCW and WAC that may otherwise bar arbitration).[14]

B. The Association Is Bound By The Agreement To Arbitrate In The Warranty Addendum.

In addition to basing its order granting the Association's motion to quash Satomi's arbitration demand on the erroneous conclusion that the FAA does not apply, the Superior Court also based its order on the conclusions that (1) Satomi did not prove that all the individual condominium owners signed the Warranty Addendum, containing the Arbitration Agreement, and (2) even if Satomi had, the Association is a legally entity separate from the individual condominium owners and, thus, the Arbitration Agreement does not apply to the Association.[15] CP 144. Both of these conclusions are also erroneous.

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[14] We again stress that even if this Court decides the FAA does not apply, that holding precludes arbitration of only the Association's WCA claim. The Association's other claims would still be subject to arbitration, requiring a stay of this lawsuit pending arbitration of the "Warranty of Habitability" and CPA claims. *See* RCW 7.04.060.

[15] The Superior Court's order states that "even if [Satomi] did [prove that the individual condominium owners signed the Warranty Addendum], the Plaintiff is a legally separate corporate entity which is neither a 'successor or transferee' to Plaintiff. Thus, the arb[itration] clause is simply inapplicable." CP 144. While the Superior Court's order technically makes no sense, in stating that "the Plaintiff" is legally separate from and not a successor or transferee to "the Plaintiff," it appears that the Superior Court meant to

1. The Superior Court Erred In Concluding That Satomi Did Not Prove That All The Individual Owners Of The Satomi Condominiums Agreed to Arbitrate — Satomi Submitted Uncontroverted Evidence Showing That All Of The Individual Owners Signed The Warranty Addendum.

As indicated above, the Superior Court did not indicate whether its initial conclusion that Satomi "did not prove that all the individual condo owners agreed to arbitrate" (CP 144) survived Satomi's motion to reconsider. CP 1394-95. To the extent it did survive, the Superior Court erred in making and sustaining that conclusion.

As a matter of uncontroverted fact, the sale of all 85 Satomi Condominium units included the Warranty Addendum, with its arbitration clause, and all the purchasers signed the Warranty Addendum. Satomi submitted to the Superior Court signed copies of the Warranty Addendum for the sales of 84 of the 85 condominium units. Established procedures and practices proved that the sale of the 85th Satomi Condominium unit also included the Warranty Addendum; that document was simply misplaced in the intervening years. The Association offered no evidence to the contrary.

Once a party seeking arbitration presents some evidence of the existence of a contract requiring arbitration of the claims at issue, the

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conclude that the Association is legally separate from the individual condominium owners.

burden shifts to the party opposing arbitration to present evidence that the arbitration agreement is invalid or does not apply to the dispute in question. *Regelin*, 735 So.2d at 457; *see also Durkin v. CIGNA Prop. & Cas. Corp.*, 942 F. Supp. 481, 487 (D. Kan. 1996) (Under the FAA's requirement of a writing, "it is not necessary that there be a simple integrated writing or that a party sign the writing. All that is required is that the arbitration provision be in writing.") (citation omitted). "Courts must indulge every presumption in favor of arbitration." *Adler*, 153 Wn.2d at 342 (citation omitted).

Here, the sale of the Satomi Condominium units included the Warranty Addendum, with its arbitration clause, to ensure the prompt and efficient resolution of disputes without court discovery and litigation:

> The Seller and Purchaser agree that the Seller's and the Declarant's warranties to the Purchaser and the Purchaser's successors and transferees, ***for the Unit and all Common Elements in the Condominium identified above***, are limited to the terms stated in this Warranty Addendum ("Warranty").
>
> ....
>
> Seller's Right to Arbitration. At the option of the Seller, Seller may require that any claim asserted by Purchaser ***or by the Association*** under this Warranty ***or any other claimed warranty*** relating to the Unit or Common Elements ***must be decided by arbitration in King County, Washington under the Construction Arbitration Rules of the American Arbitration Association (AAA)*** in effect on the date hereof, ... ***Any issue about whether a dispute or claim must be arbitrated pursuant to this Warranty shall be determined by the arbitrator. . . . . There shall be no substantive motions or discovery,***

> ***except the arbitrator shall authorize such discovery as may be necessary to ensure a fair hearing***, which shall be held within 120 days of the demand and concluded within two days. . . . The decision rendered by the arbitrator shall be final and binding without appeal . . . .

See, e.g., CP 167, 170. Paragraph 10 of the Warranty Addendum requires that, on re-sale, original purchasers bind subsequent purchasers to the arbitration clause. *See, e.g.*, CP 171.

Satomi submitted to the Superior Court copies of the Warranty Addendum signed by 84 of the 85 Satomi Condominium unit purchasers. CP 163-1176. Satomi also submitted declarations from Judy Nordstrom, the Customer Service Representative for Intracorp Real Estate, LLC (which managed the construction and sale of the Satomi Condominiums). Those declarations establish that agreeing to the Warranty Addendum was a requirement for all of the purchasers of the Satomi Condominium units and that, although the 85th signature page could not be found at this time, the sale of the 85th Satomi Condominium unit also obviously included the Warranty Addendum, since requiring that signature was the standard practice before allowing the sale of a Satomi Condominium unit to close. CP 119-20, 163-64, 1383-84. Ms. Nordstrom testified that she is "confident that the 85th homeowner also signed the Warranty Addendum Agreement, since it was a ***requirement*** for all purchasers in order to

achieve uniformity." CP 1384 (emphasis added). That 85th signature page has apparently been misplaced in the intervening years. CP 1384.

The Association submitted no evidence — no testimony, not a single declaration, not even an exhibit — contradicting the fact that all purchasers of the Satomi Condominiums signed and agreed to the Warranty Addendum, with its arbitration clause. Thus, the ***only*** evidence presented to the Superior Court was that all 85 homeowners signed the Warranty Addendum, containing the Arbitration Agreement.

As shown by the 84 signed Warranty Addendum agreements submitted to the Superior Court, and as shown by Ms. Nordstrom's explanation for why the 85th signed Warranty Agreement was not also submitted, there is no doubt that all the homeowners agreed to arbitrate. Once Satomi presented evidence of a valid agreement to arbitrate, it became the Association's burden to prove that an issue existed as to whether the condominium owners in fact agreed to the Warranty Addendum. But the Association offered no evidence to refute Satomi's proof that the condominium owners signed the Warranty Addendum. In short, there can be no genuine dispute that the buyers of the Satomi Condominiums agreed to the Warranty Addendum, including its

agreement to arbitrate.[16] Accordingly, the Superior Court erred by concluding that Satomi did not prove that the individual owners of the Satomi Condominiums agreed to arbitrate, and by granting the Association's motion to quash Satomi's arbitration demand based on that erroneous conclusion.

(2) At A Minimum, The Superior Court Should Have Held A Trial On The Issue Of Whether All The Individual Condominium Owners Agreed To The Warranty Addendum.

There was no oral argument before the Superior Court on the Association's motion to quash arbitration, though oral argument was requested by Satomi in its response to the Association's motion. CP 109-10.[17] At a minimum, the Superior Court should have held a short hearing on the issue of whether all the individual condominium owners agreed to the Warranty Addendum. Pursuant to RCW 7.04.040 (and 9 U.S.C. § 4), if a party asserts that a claim must be submitted to arbitration under the terms of an agreement to arbitrate, a trial court has

[16] Without providing any supporting evidence, the Association asked in its briefing below whether re-sale purchasers agreed to the Warranty Addendum. But the Association presented no evidence that there had ever been a re-sale. In any event, Satomi presented uncontroverted evidence that the original purchasers signed the Warranty Addendum, and the express terms of the Warranty Addendum require those original unit purchasers to bind subsequent purchasers to the terms of the Warranty Addendum. *See, e.g.,* CP 171.

[17] The first page of Satomi's response brief reads, at line 2 at the top, "Oral Argument Requested." CP 109. In addition, the opening section of the response brief concludes with "Satomi also respectfully requests that this Court hear oral argument on these motions." CP 110.

only two options: the court must either order that the parties proceed to arbitrate the claim in accordance with the terms of the arbitration agreement (RCW 7.04.040(1) and (4)), or "[i]f the court shall find that a substantial issue is raised as to the existence or validity of the arbitration agreement or the failure to comply therewith, the court ***shall*** proceed immediately to the trial of such issue." RCW 7.04.040(2) (emphasis added).[18] *See Palm Harbor Homes*, 111 Wn. App. at 455 (where a trial court finds significant issues regarding the enforceability of an arbitration agreement, pursuant to RCW 7.04.040, special proceedings are to be invoked, resulting in a "mini-trial" regarding the issues in question); *Stein*, 105 at 44, *citing Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 441-42, 783 P.2d 1124 (1989).

Here, as discussed above, after Satomi asserted that the Association's claims must be arbitrated,[19] Satomi presented the Superior Court with uncontroverted evidence that all the owners of the Satomi Condominiums signed the Warranty Addendum, which included the

[18] RCW 7.04.040(1) concerns situations where the arbitration demand is raised in a motion to compel arbitration. RCW 7.04.040(4) concerns situations where the arbitration demand is made by a notice of intention to arbitrate. Both subsections require that the Superior Court either order arbitration to proceed or immediately conduct a hearing on any substantial issue as to the existence or validity of the arbitration agreement. RCW 7.04.040(2). Here, Satomi both served the Association with a notice of intent to arbitrate (CP 47-48) and moved to compel arbitration (CP 109-37).

[19] *See* note 18 *supra*.

Arbitration Agreement. CP 163, 1383.[20] But rather than ordering the parties to arbitrate or trying the issue of whether all the owners signed the Warranty Addendum (as required by RCW 7.04.040), the Superior Court simply concluded that Satomi "did not prove that all of the individual condo owners agreed to arbitrate" and, based on that conclusion, granted the Association's motion to quash Satomi's arbitration demand. CP 143-44. What the Superior Court did was not an option under RCW 7.04.040. At minimum, the Superior Court should have conducted a hearing on the issue of whether all the owners agreed to arbitrate. Thus, the Superior Court erred by concluding, without conducting a trial on the issue, that Satomi did not prove that all the owners agreed to arbitrate, and by granting the Association's motion to quash Satomi's arbitration demand based on that erroneous conclusion.

3. The Superior Court Erred In Concluding That The Warranty Addendum Is Inapplicable To The Association.

In granting the Association's motion to quash Satomi's arbitration demand, the Superior Court concluded that even if the Satomi Condominium unit owners had agreed to arbitration, the Satomi owners

[20] The Association did not offer any evidence or testimony to rebut the testimony and evidence offered by Satomi regarding the issue of whether each condominium unit purchaser signed the Warranty Addendum. The Association merely raised the issue in the text of its motion to quash, without any supporting declarations or exhibits. CP 21, 140.

association did not – and since the Association is a legally separate corporate entity, that arbitration agreement could not bind the Association. CP 143-44. The Superior Court did not indicate whether this conclusion survived Satomi's motion to reconsider. CP 1394-95. To the extent it did survive, the Superior Court erred in making and sustaining this conclusion.

The Association owns nothing. The 85 individual unit owners — not the Association — own the condominium common areas and all other property at issue in this suit. Although the Association has the authority to sue on behalf of the unit owners, that does not change the dispositive fact that the Association has no rights or claims for defects in the Satomi Condominiums greater than the rights and claims of the unit owners on whose behalf it is suing, which unit owners are bound by the Arbitration Agreement. Further, the unit owners themselves had to vote to authorize the Association to pursue these claims on the Satomi Condominium unit owners' behalf. The unit owners cannot nullify the arbitration provision governing the Satomi Condominium units' sales by simply allowing another entity (their owners association) to bring their Satomi Condominium claims on their behalf.

The Association alleges defects in construction and construction materials regarding the Satomi Condominiums and resulting damages throughout the Satomi Condominium complex, including the

condominium units, limited common elements, and common elements. CP 3-9. Based on those allegations, the Association is suing Satomi for breaches of express and implied warranties under the WCA and the Implied Warranty of Habitability" and violations of the CPA stemming from those alleged breaches. CP 6-9.[21]

The Association has brought these claims, not on behalf of itself, but on behalf of the individual condominium owners.[22] Specifically, the Association does not own the condominium property at issue in this case. Instead, by statute, the common areas of the Satomi Condominiums are owned by the individual unit owners, not the Association. *See* RCW 64.34.224(1) (requiring allocation of common element interests to each condominium unit owner). Similarly, the Satomi Condominiums' limited common areas are, as a matter of law, owned by the unit owners, not the Association. *See* RCW 64.34.228(1) (requiring allocation of limited common elements to condominium unit owner); *see also* 18 Wash. Prac., Real Estate: Transactions § 12.5 (2d. ed. 2006) ("The common elements and limited common elements are ***owned by the unit owners, not by the***

[21]The sole claim in which the Association is suing on its own behalf is for violation of the duty to provide the Association with the plans and specifications utilized in the construction or remodeling of the Satomi Condominiums, under RCW 64.34.312(j) and Section 14.3.10 of the Condominium Declaration for the Satomi Condominiums. CP 6-7.

[22] *See* RCW 64.34.304(1)(d) (The association may "institute, defend, or intervene in litigation or administrative proceedings in its own name *on behalf of* itself or *two or more unit owners on matters affecting the condominium.*").

condominium association or by anyone else.) (emphasis added). And, of course, each unit owner owns her/his particular unit.

The WCA's warranties of quality, upon which the Association's claims rely, run from Satomi to the unit purchasers. The warranties do not run to the Association. The *express* warranties of quality read as follows: "Express warranties ***made by any seller to a purchaser of a unit***, if relied upon by the purchaser, are created as follows: . . ." RCW 64.34.443(1) (emphasis added). Similarly, the WCA's implied warranties of quality provide that "[a]ny conveyance of a unit transfers ***to the purchaser*** all of the declarant's implied warranties of quality." RCW 64.34.445(6). There is no language within the implied warranties indicating that the implied warranties are intended to run to a condominium owners association itself. *See* RCW 64.34.445.

Thus, the express and implied warranties of the WCA run to the Satomi Condominium unit purchasers and not to the Association. The Association cannot bring suit on behalf of itself to enforce warranties that run to the unit purchasers only and not to the Association.

Similarly, Washington's implied warranty of habitability is a doctrine rooted in common law that runs from the builder-vendor of a new residence to the first *purchaser* only and is inherent in the sales transaction itself. *Stuart v. Coldwell Banker Commercial Group*, 109 Wn.2d 406,

416, 745 P.2d 1284 (1987) ("The doctrine of implied warranty of habitability imposes liability upon builder-vendors in favor of original purchasers of residential property."); *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 694, 106 P.3d 258 (2005) ("The implied warranty of habitability arises by implication from the sale transaction itself."). Thus, as the Association itself was not the purchaser of the Satomi Condominiums, the warranty runs not to the Association, but to the individual members of the Association, the purchasers of the condominium units. Pursuant to the WCA, the Association may institute litigation on behalf of the condominium purchasers regarding matters that impact the condominium, such as an alleged breach of the implied warranty of habitability. However, in any litigation seeking to enforce the implied warranty of habitability, the Association cannot bring suit on its own behalf, but must bring suit on behalf of the purchasers, the persons who actually hold the warranty.

Finally, although Washington courts have recognized a private right of action under the CPA, the right of action lies only for the individuals allegedly deceived in the consumer transaction. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792-93, 719 P.2d 531 (1986) ("Only a person 'injured in his business or property by a violation of RCW 19.86.020 . . .' may bring a private

action."). Since the allegations in this lawsuit concern alleged construction defects and resulting property damage, and the Association does not itself own the property, the CPA claims in this lawsuit belong to the individual condominium unit owners (the property owners), and not the Association.

Therefore, the Association's claims for breaches of warranty and violations of the CPA are brought on behalf of the individual unit owners and are derivative of the rights held by those individual homeowners. But the individual homeowners do not have the right to litigate the claims that the Association has brought on their behalf. Instead, they have only the right to arbitrate those claims. As discussed above, each of the owners of the individual Satomi Condominium units agreed to the Arbitration Agreement in the Warranty Addendum. And the Arbitration Agreement provides that Satomi "may require that any claim asserted by Purchaser or by the Association under this Warranty ***or any other claimed warranty*** relating to the Unit or Common Elements must be decided by arbitration." *See, e.g.*, CP 170. Thus, the owners of the individual units have agreed to arbitrate the claims asserted in the Association's Complaint for breaches of express and implied warranties and violations of the CPA stemming from those alleged breaches. CP 6-9.

Because the Association's "rights" are derivative of the individual unit owners' rights, the Association cannot have rights greater than the unit owners' rights. The Association is therefore not entitled to litigate; the Association must arbitrate.

Washington authority squarely supports this logic. For example, the Washington Supreme Court addressed analogous issues in *Coldwell Banker*.[23] In that case, board members of a condominium association filed a lawsuit in their representative capacities on behalf of both original and subsequent purchasers of condominium units, seeking damages for construction defects in common and limited common areas of the condominium complex.[24] *Coldwell Banker*, 109 Wn.2d at 410. Notably, and similar to this case, the suit alleged that defendants were liable under theories of breaches of express and implied warranties, misrepresentation, and violations of the CPA. 109 Wn.2d at 411. The trial court found that plaintiffs' suit was timely brought within the applicable statute of limitations, reasoning that the claims accrued when the association had notice of the defects, even though the defects were known by condominium owners prior to the time the association allegedly knew.

[23] Although this case was decided under a precursor statute to the current WCA, *Coldwell Banker* and its reasoning are still good law. 18 Wash. Prac., Real Estate: Transactions § 12.5 (2d. ed. 2006)

[24] Under the precursor statute, the board of directors of the condominium association had standing to sue on behalf of two or more individual condominium owners. *Coldwell Banker*, 109 Wn.2d at 413.

109 Wn.2d at 411. On appeal, the Supreme Court held that the statute of limitations precluded the association from bringing suit because the statute of limitations accrued when the *homeowners*, not the *association*, had notice of the defects, since the homeowners' rights were being asserted:

> The [condominium association] has standing to sue on behalf of and as a ***surrogate*** for the individual homeowners. [The defendant] argues with merit that this statutory grant of standing does not accord [the condominium association] the status of a separate juristic entity. The Association is not incorporated. It has no life independent of the individual homeowners who are by statute and under the terms of the Declaration of Condominium required to be members of the Association. ***The rights being asserted, and the claims being made, belong to the individual homeowners.***

Coldwell Banker, 109 Wn.2d at 413-14 (emphasis added).

Moreover, the court explicitly stated that it would not allow the condominium association to circumvent the statute of limitations by its statutory grant of standing: "The [condominium association's] ***strategic decision*** to bring suit at the time it did will not be aided by this court with a reading not sustained ***by the language and spirit*** of [the former statute granting the association standing]." *Coldwell Banker*, 109 Wn.2d at 414 (emphasis added). *See also* 18 Wash. Prac., Real Estate: Transactions §12.5 (2d. ed. 2006) ("[T]he Washington Supreme Court held in *Stuart v. Coldwell Banker Commercial Group, Inc.*, that when an association

represents unit owners in a lawsuit, it remains their action, with the association only a nominal party.").

In addition to the fact that the Association's claims are brought on behalf of the unit owners and thus the Association is bound by the owners' agreement to arbitrate, the Arbitration Agreement explicitly states that it applies to "any claim asserted by Purchaser ***or by the Association*** . . . ." *See, e.g.,* CP 170. Therefore, in the same way that a purchasing shareholder often is required to cast her/his vote for corporate action in a particular fashion, because the shareholder has agreed in his shareholder purchase agreement that the *corporation* will take some action, so too each homeowner has bound herself/himself to ensure that the Association abide by the Arbitration Agreement. Indeed, to interpret the Arbitration Agreement as not requiring the unit owners to ensure that the Association abide by the Arbitration Agreement, is to run afoul of the most fundamental rule of contract interpretation — the rule mandating that a contract be read so as to not render any portion "mere surplusage."[25] Were the unit owners not required to ensure that disputes between the Association and Satomi be arbitrated, the words "or by the Association" in the Warranty Addendum would be rendered surplusage.

[25] *See Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 541-42, 943 P.2d 358 (2004) (rejecting contractual interpretation that "would render the former clause surplusage and violate the rules of contract construction"); *Newsom v. Miller*, 42 Wn.2d 727, 731, 258

This carefully articulated arbitration requirement binding the Association *via the unit owners* is equally explicit in the Condominium Declaration that burdens every one of the Satomi Condominium units. The Condominium Declaration provides that the only way the Association may pursue the condominium owners' claims is for more than sixty-seven percent of the individual owners to vote in favor of that pursuit. CP 1200. The Condominium Declaration is clear in this regard:

> Section 13.4 Powers of the Association: In addition to those actions authorized elsewhere in the Declaration, the Association shall have the power to
>
> . . . .
>
> 13.4.4 Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more Unit Owners on matters affecting the Condominium; **provided, however, that the approval of Owners holding at least 67% of the votes in the Association shall be required before the Association may institute, commence or intervene in any litigation or administrative proceeding, including arbitration,** other than litigation or other proceedings against Owners for collection of delinquent Assessments....

Id. (emphasis added).[26]

P.2d 812 (1953) (interpretation of a contract "which gives effect to all of its provisions is to be favored over one which renders some of the language meaningless or ineffective"); Restatement (Second) of Contracts, § 203, cmt. B (1981) ("since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous"); 17A Am.Jur.2d Contracts, § 378 ("No word or clause should be rejected as mere surplusage if the court can discover any reasonable purpose thereof.").

[26] The only way to obtain a vote in the association is to own a condominium unit. CP 1200 ("Each owner of a Unit (including the Declarant) shall be a member of the Association and shall be entitled to one membership for each Unit owned, which

In other words, the only way for the Association to be authorized to pursue these claims in court (rather than in arbitration) is for the unit owners (members of the Association) to breach the arbitration agreements they signed.

Each and every unit owner specifically agreed that Satomi "may require that any claim asserted by Purchaser ***or by the Association*** . . . must be decided by arbitration . . . ." *See, e.g.,* CP 170. In agreeing that the Association must arbitrate, each unit owner undertook the duty to ensure that the Association will arbitrate, and not litigate.

It is common in the formation of juristic entities — corporations, limited liability companies, etc. — to bind the juristic entity by binding the constituent members to cast their votes in a particular way. The current situation involving the Association is no different. To return to the example noted above, it is a common technique when individuals form a corporation, or when individuals sell stock (especially when the viability of the corporation depends on key events), for the individuals to agree that "the corporation shall . . . ," even though the corporation is not a party to the agreement. The effect of such provisions is that the individuals have a good faith duty ***to cause the corporation*** to satisfy the obligation. After

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membership shall be considered appurtenant to that member's Unit. Ownership shall be the sole qualification for membership in the Association.").

all, the duty of good faith and fair dealing is an implied term of every contract in Washington.

The individual owners of the Satomi Condominiums have a duty to cause the Association to arbitrate.

Satomi could sue each unit owner and secure an order requiring the owners to honor their obligation, by causing the Association to abide by the Arbitration Agreement. Such a cumbersome procedure is not necessary here, where the only pertinent rights of the Association are entirely derivative of the unit owners' rights.

The Condominium Declaration, approved by every unit owner, includes the specific vehicle by which the unit owners are to exercise their contractual, good-faith duty to ensure that the Association arbitrate, rather than litigate. CP 1200. The unit owners affirmatively must approve arbitration or litigation, and, in light of their contracts with Satomi, the unit owners cannot allow the Association to litigate this matter. Arbitration is mandated.

Putting these reasons together leaves no doubt that the Association is required to arbitrate. Otherwise, (1) the Association would be exercising a right it does not have, (2) language in the Warranty Addendum would be rendered surplusage, and (3) the unit owners would be in violation of their contractual duties.

The applicable law here is stated succinctly in a Florida federal decision in which doctors (like the homeowners in our case) attempted to avoid their arbitration obligations by suing through their medical association. The medical association asserted RICO claims and state statutory claims (just like the association in our case). The court held that the association was bound by the doctors' arbitration clauses, even though the claims arose outside the contract containing the arbitration clause (as the homeowners wrongly contend in our case):

> These medical associations have brought suit for declaratory and injunctive relief both individually and on behalf of their respective memberships . . . . Associations suing in a representative capacity generally are bound by the same limitations and obligations as the members that they represent. *Hunt v. Wash. St. Apple Adver. Comm'n,* 432 U.S. 333, 342-43, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) (citing *Warth v. Seldin,* 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)); *Communications Workers of Am. v. AT & T Co.,* 40 F.3d 426, 434 n. 2, 435 (D.C.Cir.1994) (dismissing union's claims because its members did not exhaust administrative remedies or submit dispute to mandatory arbitration). In fact, Defendants argue that associations are bound by the greatest commitments of the least of their physicians; otherwise, it would permit those physicians to escape their commitments merely by having a representative sue on their behalf. *Crow Tribe of Indians v. Campbell Farming Corp.,* 828 F. Supp. 1468, 1478 (D.Mont.1992), *aff'd,* 31 F.3d 768 (9th Cir. 1994), *cert. denied,* 514 U.S. 1018, 115 S. Ct. 1362, 131 L. Ed. 2d 218 (1995).
>
> Because the Court has ruled that many of the pending claims of individual Providers must be submitted to arbitration, it is inevitable that certain of each of the

> associations' members are required to arbitrate the claims raised on their behalf.

In re Managed Care Litig., 2003 WL 22410373 (S.D. Fla., Sep. 15, 2003) (unpublished opinion). This law is merely judicial imprimatur of the reasoning discussed above that the homeowners cannot use the Association as a vehicle to avoid arbitration.

The Association must arbitrate because the unit owners must arbitrate. Not enforcing the Arbitration Agreement would render it surplusage, would grant the Association a right it cannot derive from its constituent homeowners, would reward the 85 unit owners' breaches of their arbitration commitments, and would force Satomi to sue the 85 unit owners individually to secure a court order requiring the owners to cause the Association to arbitrate.

Finally, the law is clear that a party bringing claims arising out of a contract is bound by an arbitration clause in that contract, even if that party did not itself sign the contract. *See Dunn Constr. Co., Inc. v. Sugar Beach Condo. Ass'n, Inc.*, 760 F. Supp. 1479, 1485 (S.D. Ala. 1991) (holding that a condominium association's claims against a contractor for negligent performance of its obligations under condominium construction contract and for fraud arose out of and were related to performance under condominium construction contract and were "intimately founded in and

intertwined with the underlying contract obligations," and thus were subject to arbitration); *see also Nationwide of Bryan, Inc. v. Dyer*, 969 S.W.2d 518, 520 (Tex. Ct. App. 1998) (holding that in a claim for breach of contract and express warranties and violations of the Texas Deceptive Trade Practices Act arising out of sale of allegedly defective mobile home, buyer wife was bound by terms of a sales contract, including arbitration provision, even though she never signed the contract because wife was a third-party beneficiary); *Zac Smith & Co. v. Moonspinner Condo. Ass'n, Inc.*, 472 So.2d 1324 (Fla. Dist. Ct. App. 1985) (holding that arbitration clause in construction contract is binding on third-party beneficiary condominium association when association filed a lawsuit in negligence and breach of contract, alleging defects in design and construction of condominium).

Here, the Association is suing on the Warranty Addendum and the contracts that the Warranty Addendum is a part of, namely, the purchase and sale agreements and the Public Offering Statement relating to the Satomi Condominiums. The Association claims that Satomi "breached the express warranties of RCW 64.34.443" of the WCA. CP 6. That statute does not actually delineate any specific warranty. Rather, it prescribes that certain written assertions made by a condominium seller constitute express warranties:

> (1) Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows: (a) ***Any written affirmation of fact or promise*** which relates to the unit....; (b) ***Any*** model or ***written description*** of the physical characteristics of the condominium at the time the purchase agreement is executed....; (c) ***Any written description*** of the quantity or extent of the real property comprising the condominium....
>
> (2) Neither formal words, such as "warranty" or "guarantee," nor a specific intention to make a warranty are necessary to create an express warranty of quality . . . . ***A purchaser may not rely on any representation or express warranty unless it is contained in the public offering statement or made in writing signed by the declarant or declarant's agent identified in the public offering statement.***

RCW 64.34.443 (emphasis added). The Association makes clear that the express warranties upon which it is suing, under RCW 64.34.443, "include those contained in the Public Offering Statement, other warranties and advertising materials or advertising statements and/or in samples." CP 6. The statements made in the Warranty Addendum are clearly express warranties under RCW 64.34.443. The Warranty Addendum, including its arbitration clause, is also a part of the purchase and sale agreements. *See, e.g.,* CP 166 (listing the Warranty Addendum as one of several addendums to the purchase and sale agreement); CP 167 (Warranty Addendum provides that it is an "Addendum No. _____ to Condominium Purchase and Sale Agreement dated 10-22-00"). And the Warranty Addendum is an exhibit to the Satomi Condominiums Public Offering Statement. CP 1178.

Thus, by claiming breach of Satomi's express warranties, "includ[ing] those contained in the ***Public Offering Statement, other warranties*** and advertising materials or advertising statements and/or in samples" (CP 6) (emphasis added), the Association is bringing claims under a contract that includes the Warranty Addendum.[27] Therefore, the Association is bound by the Arbitration Agreement in the Warranty Addendum for this additional reason.

CONCLUSION

The Association's members (the owners of the Satomi Condominiums) agreed to arbitrate the claims that the Association now brings against Satomi on their behalf. Although the members would like to avoid their agreement to arbitrate by causing the Association to bring their claims, the law, as discussed above, does not allow them to. The Association is required to arbitrate the members' claims, just as the members are required to arbitrate. Accordingly, the Superior Court erred by granting the Association's motion to quash Satomi's arbitration demand and, thereby, denying Satomi's motion to compel arbitration. At minimum, the Superior Court should have held a trial on the issue of

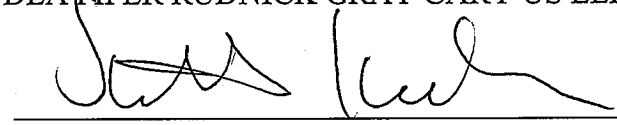
[27] The Association's claims are not viable claims. Indeed, the Association has already conceded that they are not pursuing any claims barred by the Warranty Addendum's one year claim period, despite pleading that claim CP 22. Nonetheless, the scope of the Association's cause of action for breach of Satomi's express warranties clearly includes any express warranties in the Warranty Addendum, as well as the purchase and sale agreements and Public Offering Statement for the Satomi Condominiums – of which the Warranty Addendum is a part.

whether the Association's claims must be arbitrated under the terms of the Warranty Addendum and its arbitration clause.

Satomi respectfully requests that this Court reverse the Superior Court's orders quashing Satomi's arbitration demand and denying reconsideration, and remand this action with instructions for the Superior Court to compel the Association to arbitrate its claims under the terms of the Warranty Addendum. Alternatively, Satomi requests that this Court reverse the Superior Court's orders and remand this action with instructions for the Superior Court to immediately proceed to trial on the issue of whether the Association's claims must be arbitrated under the terms of the Warranty Addendum.

RESPECTFULLY SUBMITTED this 6th day of January, 2006.

DLA PIPER RUDNICK GRAY CARY US LLP



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CERTIFICATE OF SERVICE

I, Pamela Wallace, certify that on the 6th day of January, 2006, I caused to be served copies of the following:

1. Opening Brief of Appellant Satomi, LLC; and

2. this Certificate of Service.

to opposing counsel via hand delivery:

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